NO. 82-958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MCDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

v.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD; JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

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BRIEF OF AMICUS CURIAE SOUTHERN UNION COMPANY

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Southern Union Company and Southern Union Gathering Company, having obtained and filed the written consent of Petitioner McDonough Power Equipment, Inc., and Respondents Billy G. Greenwood, et al., file this *Amicus Curiae* Brief in Support of Respondent Billy G. Greenwood, et al.

I. STATEMENT OF INTEREST

Southern Union Company and Southern Union Gathering Company (collectively "Southern Union") are defendants in several consolidated actions currently pending in the District of Colorado styled *In re New Mexico Natural Gas*

Antitrust Litigation, MDL Dkt. No. 403. Southern Union Company operates as a regulated natural gas utility in New Mexico. The gravamen of the complaints in MDL 403 is that Southern Union and several natural gas producers allegedly engaged in a conspiracy to fix the price of intrastate natural gas in the San Juan Basin of New Mexico, in violation of Section 1 of the Sherman Act. Plaintiffs seek damages in excess of $600 million.

One of the actions, *Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578-HB, was brought on behalf of all residential gas customers of Southern Union Company in New Mexico. The certified class is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." Because many potential jurors were either class members or closely related to class members, the trial court and counsel made extraordinary efforts to ensure that neither group served as jurors.

On March 26, 1982, a jury returned a liability verdict against Southern Union. Following the trial, it was determined that one member of the jury had three children who were members of the plaintiff class in the *Brewer* case. The juror had falsely stated in a pretrial questionnaire that none of his relatives were Southern Union customers, and declined an opportunity during voir dire to change his answer. Under the district court's rulings, had the juror made proper disclosure he would have been automatically excused for cause.

On January 17, 1983, the district court, relying on the Tenth Circuit opinions in *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982); *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964); and *Consolidated Gas and Equipment Co. of America v. Carver*, 257 F.2d 111 (10th Cir. 1958), held that the juror's failure to

disclose that his children were customers of Southern Union had deprived the defendants of their right to exercise a peremptory challenge and therefore ordered a new trial. (A copy of the unpublished opinion is attached as Appendix I). The case was subsequently transferred to the District of Colorado pursuant to 28 U.S.C. § 1404(a).

This Court's disposition of the *Greenwood* case may directly affect Southern Union's interests in MDL 403. Accordingly, Southern Union files this *amicus curiae* brief.

II. SUMMARY OF ARGUMENT

The Constitution guarantees not only the right to trial by jury but also the right to a fair and impartial jury. This Court has long recognized the critical role which the right of peremptory challenge, secured to civil litigants by statute, plays in securing the Constitutional right to a fair and impartial jury. Denial of the peremptory challenge right is clearly grounds for new trial in both civil and criminal cases. Peremptory challenges are important because they allow counsel to excuse from the jury those whom he suspects of bias even though the suspected bias might not constitute grounds sufficient to sustain a challenge for cause.

The Courts of Appeals have recognized that the right of peremptory challenge is ineffective unless counsel has sufficient information to allow him to exercise the challenge intelligently. They have granted new trials where the trial court refused to ask questions which would have allowed counsel to exercise his peremptory challenge rights intelligently. Acquiring sufficient information requires, however, not only that court and counsel direct appropriate inquiry to potential jurors, but also that potential jurors answer accurately the questions posed. A party is just as effectively denied the right by a juror's failure to answer a question as it is by the judge's failure to ask it.

Recognizing that the effective exercise of the right of peremptory challenge depends upon a juror's supplying accurate information in response to voir dire questions, the Tenth Circuit held in this case that where a juror fails to disclose information during voir dire, and the non-disclosed information is of "sufficient cogency and significance to cause [the court] to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge," a party is entitled to a new trial. The rule logically follows from the premise, unchallenged in any circuit, that the exercise of the right to peremptory challenge depends upon counsel's receiving accurate information.

Peremptory challenges are designed to eliminate from the jury those whom counsel suspects of bias but whose suspected bias may not justify a challenge for cause. If bias which would justify a challenge for cause were demonstrable at voir dire, no peremptory challenge would be needed.

Of course, not every nondisclosed fact during voir dire examination should lead to a new trial, nor should a new trial be granted where the question was ambiguous or unclear so that the juror was not put on notice of his duty to respond. However, where the question is plainly put and where the nondisclosed information is material to the possibility of a predetermined attitude against a party or regarding some important issue in the case, then counsel is clearly entitled to know of such information, even if the information would not have resulted in a challenge for cause. Without such information, counsel cannot exercise the peremptory challenge effectively.

Determining whether the right to a peremptory challenge has been denied requires only a factual record sufficient to demonstrate whether material information has gone undisclosed; a hearing is not necessarily required if the facts are undisputed. While a trial court should only act where it

has a sufficient factual basis for determining that the right to exercise a peremptory challenge has been denied, there is no compelling reason why those facts, if not subject to genuine dispute, must be adduced at a hearing. Indeed there are cogent reasons why a hearing should not be required: *e.g.* the spectre of citizens being called to court and interrogated may have a "chilling effect" on their willingness to serve as jurors. Since the prejudice results from the failure to disclose pertinent information, the only relevant issues are whether the information was not disclosed and whether the information is sufficiently indicative of possible bias.

III. DISCUSSION

A. Peremptory Challenges are Essential to Obtaining A Fair Trial.

Although the Constitution specifies neither procedures for obtaining an impartial jury nor tests for determining juror partiality, *United States v. Wood*, 299 U.S. 123 (1936), voir dire examination has developed as the principal mechanism for ferreting out jurors who are disqualified or who may be biased:

> The very purpose of voir dire examination is to develop the whole truth concerning the prospective juror's state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective juror's suspected bias or prejudice.

Photostat Corp. v. Ball, 338 F.2d at 786.

Both the federal rules of civil and criminal procedure grant trial judges broad discretion in conducting voir dire.[1] But that discretion is not unfettered. The trial court has a serious duty to determine questions of potential juror bias. *Dennis v. United States,* 339 U.S. 162, 168 (1950). This Court has reversed criminal convictions where the trial judge failed to allow voir dire aimed at disclosing serious prejudice. *Ham v. South Carolina,* 409 U.S. 524 (1973) (failure of trial judge to inquire about racial prejudice was denial of due process); *Aldridge v. United States,* 283 U.S. 308 (1931) (failure of trial judge to allow counsel to inquire about racial prejudice was reversible error). These cases are clearly premised on the notion that litigants are entitled to information indicative of bias or prejudice when challenging jurors.

Although not specifically guaranteed by the Constitution, the right of peremptory challenge is statutorily granted in civil cases[2] and is a necessary part of trial by jury. *Lewis v. United States,* 146 U.S. 1011 (1892). In *Swain v. Alabama,* 380 U.S. 202 (1965), this Court outlined the importance of the peremptory challenge:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re*

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[1] Fed. R. Civ. P. 47 provides in part: "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." Fed. R. Crim. P. 24(a) authorizes the same procedure in criminal cases.

[2] 28 U.S.C. § 1870 states: "In civil cases, each party shall be entitled to three peremptory challenges."

Murchison, 349 US 133, 136 (1955). Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause . . .

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. *Hayes v. Missouri,* 120 U.S. 68 (1887).

380 U.S. at 220. Thus the peremptory challenge is essential to obtaining a fair trial.

B. Impairment of the Right of Peremptory Challenge Requires a New Trial.

The right of peremptory challenge is "an arbitrary capricious right and it must be exercised with full freedom or it fails of its full purpose." *Lewis v. United States,* 146 U.S. at 1014. The denial or impairment of the right is reversible error without a showing of prejudice. *Swain v. Alabama,* 380 U.S. 202 (1965). A party need not show that a biased juror served on the jury to establish denial of the right to exercise a peremptory challenge. Moreover, where the right to exercise a peremptory challenge has been denied, a party is entitled to a new trial irrespective of how the right was denied. *Carr v. Watts,* 597 F.2d 830 (2d Cir. 1979) (right was denied where judge forced plaintiff to exercise all peremptory challenges before replacement jurors seated); *United States v. Turner,* 558 F.2d 535 (9th Cir. 1977) (right was denied where judge forced a defendant to forego a peremptory challenge each time he accepted the panel as then constituted). Courts have also held that the right is denied where the judge forces a party to exercise a peremp-

tory challenge on a person properly challengeable for cause. *United States v. Rucker,* 557 F.2d 1046 (4th Cir. 1977); *United States v. Nell,* 526 F.2d 1223 (5th Cir. 1976).

Unlike the challenge for cause, which is determined by the trial court, the peremptory challenge permits trial counsel unfettered discretion to challenge jurors on behalf of his client. The Courts of Appeals have recognized that for the right to be effective, sufficient information must be elicited during voir dire to allow counsel to exercise the right intelligently. In *Kiernan v. Van Schaik,* 347 F.2d 775 (3d Cir. 1965), the trial court, in accordance with local custom, had asked only a few perfunctory questions designed to ascertain obvious disqualification. The Third Circuit reversed, stating:

> In following a local custom which forbids voir dire examination in aid of peremptory challenge . . . the court below deprived plaintiff of a necessary and important right.

347 F.2d at 779.

In *United States v. Rucker,* 557 F.2d 1046 (4th Cir. 1977), the Fourth Circuit reversed a conviction where the trial court refused to ask sufficient questions to allow counsel to exercise his peremptory challenges intelligently. After noting the importance which this Court has accorded the right to exercise peremptory challenges, the Court of Appeals stated:

> Of course, this purpose would largely be vitiated if peremptory challenges were required to be exercised without the benefit of adequate information upon which rational challenges may be predicated, irrespective of whether such information is actually utilized, or whether the crucial factor to a particular defendant is "those with

> blue eyes." While it is the nature of a peremptory challenge that it may be exercised capriciously or whimsically, at least the opportunity to exercise it meaningfully must be present. Thus, the adequacy of the court's voir dire examination becomes inevitably bound up with the defendant's opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause. If probing questions are never asked . . . salient information about prospective jurors might never be revealed, and the entire process would do nothing to advance the cause of selecting a competent, disinterested jury . . . A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice.

557 F.2d at 1048, 1049. *See also United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979) (trial court's refusal to ask prospective jurors whether they would give greater or lesser weight to testimony of law enforcement officer or whether they were acquainted with witnesses denied right to peremptory challenge); *United States v. Dellinger*, 472 F.2d 340, 366-77 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Thus, a party clearly has a right to a voir dire examination sufficient to allow the meaningful exercise of its right to peremptory challenge.

If a trial judge has a duty to conduct voir dire examination to allow a litigant to exercise his peremptory challenge right intelligently, the right would be completely vitiated if no duty is imposed upon a venireman to answer accurately the questions posed by the judge or counsel. The right to peremptory challenge is just as effectively denied by a venireman's failure to answer accurately a question as by a judge's failure to ask it. Both deny a litigant information essential to the effective exercise of the peremptory challenge. If the right recognized by this

Court and granted by Congress is essential to a trial by jury, and if its effective exercise depends upon acquiring adequate information, some remedy must be available for a juror's failure, upon adequate questioning, to provide a party with that information.

In recognition of these facts the Tenth Circuit holds that where a juror fails to disclose information "of sufficient cogency and significance" to cause the court to believe that counsel was entitled to know of it in exercising a peremptory challenge, the party is entitled to a new trial. This rule, embodied in *Greenwood, Photostat,* and *Carver,* sensibly focuses upon the factor deemed crucial to exercising the challenge, *i.e.,* the information of which counsel was deprived. If a judge's failure to ask adequate questions is to be remedied by a new trial, then the same consequence should follow from a juror's nondisclosure of material information which he is asked to reveal.

Other circuits also grant new trials where a juror does not disclose material information. For example, the Sixth Circuit holds that a party has been deprived of its right to exercise a peremptory challenge where the juror either deliberately conceals information or the non-disclosed information would have led to a challenge for cause. *McCoy v. Goldston,* 652 F.2d 654 (6th Cir. 1981). The Fourth Circuit holds that where a juror deliberately conceals information and that information indicates "possible bias" then the right to exercise a peremptory challenge has been denied. If the non-disclosure was not intentional, then the moving party must show either actual bias or circumstances under which bias will be presumed. *See United States v. Bynum,* 634 F.2d 768 (4th Cir. 1980); *Fallaw v. Michelin Tire Corp., No.* 81-1812 (4th Cir. May 20, 1982) (unpublished opinion attached as Appendix II). Thus, other Courts of Appeals hold that under certain circum-

stances a juror's failure to disclose important information during voir dire deprives a party of its right to exercise a peremptory challenge, thereby entitling it to a new trial.

Petitioner asserts that presumptions of bias are no longer favored by this Court and that a presumption of bias in the context of the exercise of peremptory challenges makes no sense. Petitioner's Brief on the Merits at 25. However, with respect to challenges for cause, presumptions of juror bias are clearly appropriate. The law has long recognized that the existence of some relationships creates a conclusive and irrebuttable presumption of bias. In those circumstances, bias will be imputed from mere proof of the existence of the relationship, and proof of the actual existence of bias need not be shown. *United States v. Wood*, 299 U.S. 123, 133 (1936). Many jurisdictions have statutes which identify relationships which automatically disqualify prospective jurors, without regard to actual bias. *See, e.g.*, Okla. Stat. tit. 20, § 660; Cal. Penal Code § 1074 (West 1970); N.Y. Civ. Prac. Law § 4110 (McKinney 1963). In other jurisdictions, such formulations are based on common law. *See, e.g., State v. West*, 157 W. Va. 209, 210, 200 S.E.2d 859, 865 (1973); *State v. Kokoszka*, 123 Conn. 161, 163, 193 A. 210, 211 (1937). If a relationship from which the court can imply bias as a matter of law is established after trial, and the party exercised diligence in ascertaining the ground for disqualification during voir dire, the moving party must be granted a new trial. *Johnston v. State*, 239 Ind. 77, 155 N.E.2d 129 (1958) (new trial granted where juror failed to disclose that she was second cousin of victim); *Crawley v. State*, 103 S.E. 238 (Ga. 1921); *Darraugh v. Denny*, 245 S.W. 152 (Ky. Ct. App. 1922) (new trial granted where jurors were second and third cousins to defendant).

In the absence of statutory guidance concerning relationships deemed to be disqualifying as a matter of law, the federal courts have followed the common law rule. This Court first adopted it in *Crawford v. United States*, 212 U.S. 183 (1909). In *Crawford*, petitioner appealed from a conviction for conspiring to defraud the United States. He assigned as error the trial court's denial of his challenge for cause to a juror who was a federal employee. In reversing the trial court's denial of a motion for a new trial, the Court stated:

> A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject.

212 U.S. at 195. The Court then noted the common law maxim that one is not a competent juror in a case if he is a master, servant, steward, counselor, or attorney of either party. "In such a case a juror may be challenged for principal cause as an *absolute disqualification of the juror*." 212 U.S. at 195 (emphasis supplied). The Court went on to explain the rationale of the rule:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore

> most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

212 U.S. at 196.

In 1935 Congress enacted D.C. Code § 11-1420 (1940), removing the disqualification, which arose as a result of the *Crawford* decision, of government employees in criminal cases and other cases where the government was a party. Although the Court has since upheld the statute in three separate challenges, in each case it has reaffirmed the principle that in some circumstances a court can imply bias on the basis of a juror's relationship to a party. *See United States v. Wood,* 299 U.S. at 133; *Frazier v. United States,* 335 U.S. 497 (1949); *Dennis v. United States,* 339 U.S. at 171; *see also United States v. Burr,* 25 F. Cas. 49, 50 (C.C. Va. 1807) (Marshall, C. J.) (a person "may declare he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice because, in general, persons in a similar situation would feel prejudice").

Smith v. Phillips, 455 U.S. 209 (1982), does not foreclose the use of presumptions of prejudice or bias against potential jurors in appropriate circumstances. First, the majority opinion did not overrule, but rather cited with approval the *Wood, Frazier,* and *Dennis* cases. These cases explicitly state that in appropriate circumstances a court may imply bias. The Court's reliance on precedent expressly affirming the doctrine indicates an intent not to disavow, modify, or discard the existing applications of the implied bias doctrine and the substantial body of precedent articulating the concept.

Additionally, in a separate concurring opinion, Justice O'Connor wrote that "the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." She further stated:

> While each case must turn on its own facts there are some extreme situations that would justify the finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial of the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of no bias, the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

455 U.S. at 222 (1982) (O'Connor, J., concurring).

Furthermore, in deciding *Smith*, the Court relied heavily on *Remmer v. United States*, 347 U.S. 227 (1954), a case distinguishable from those involving allegations of implied bias. In *Remmer*, a juror in a federal criminal trial was offered a bribe in exchange for a favorable verdict. After trial, defense counsel learned of the incident and filed a motion for a new trial. The trial court denied the motion without a hearing. The Court reversed, stating:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . *The presumption is not conclusive,* but the burden rests heavily upon the Government to establish, after notice to and hearing of defendant, that such contact with the juror was harmless to defendant.

347 U.S. at 229 (emphasis supplied). The Court remanded the case to the district court to hold a hearing to determine whether the incident was prejudicial to the defendant.

Smith and *Remmer* are clearly distinguishable from cases involving impairment of the right to exercise peremptory challenges. In *Smith*, as in *Remmer*, the allegation of partiality arose out of improper jury contact during trial rather than a juror's failure to disclose information on voir dire. The cases do not involve prejudice which existed during the voir dire examination, because the events giving rise to the presumption of prejudice occurred after the jury had been impanelled, *i.e.*, after the point at which the right to exercise challenges for cause or peremptory challenges had passed. *Smith* and *Remmer* hold that improper juror contact creates only a *rebuttable* presumption of prejudice. In contrast, a juror's pre-existing relationship may create a *conclusive* presumption of bias. *Crawford v. United States*, 212 U.S. 183, 196 (1909) (". . . with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given").

In addition, unlike *Smith*, this case does not involve the issue of federal-state comity. As the Court noted in *Smith*, a habeas corpus case, "federal courts hold no supervisory authority over state judicial proceedings and may only intervene to correct wrongs of constitutional dimension." 455 U.S. at 221. If the facts in the instant case had arisen in the context of a state criminal proceeding, the petitioner would have had no federal recourse, since the right to exercise peremptory challenges is not secured by the Constitution. *Stilson v. United States*, 250 U.S. 583 (1919). However, having recognized the essential role played by peremptory challenges in securing a fair trial, this Court may, pursuant to its supervisory power over the lower federal

courts, formulate rules relating to voir dire examination which will protect the peremptory challenge right. The Tenth Circuit rule is the most reasoned and effective means of ensuring this right.[3]

Petitioner claims that the appropriate course where allegations of juror nondisclosure are made is to hold a hearing to determine actual bias. This position misperceives the nature of appropriate inquiry. The legal issue to be resolved is whether a party has been denied its right to exercise a peremptory challenge. To determine that issue the court need focus only upon (1) the nature of the information withheld and (2) the relationship of that information to the parties or issues in the case. Although a court must have a sufficient factual basis for justifying its con-

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[3] MDL 403 illustrates the reality and seriousness of juror nondisclosure during voir dire. There, a person with three children who were plaintiff class members served as a juror despite extraordinary efforts to ferret out such disqualified persons. The district court recognized the difficulty of impanelling an impartial jury due to the fact that most potential jurors were customers or closely related to customers of the defendant gas utility Southern Union. Therefore, the court sent a questionnaire to potential jurors which inquired, *inter alia*, whether they or their relatives were Southern Union customers. "Relatives" was specifically defined to include children. Any person answering "yes" was automatically excused for cause. The juror in question gave a false "no" answer on his questionnaire. During voir dire, the trial court directed the same question to the jury panel. Again the juror failed to respond accurately. The district court held that the juror's failure to disclose his children's status impaired Southern Union's right to exercise a peremptory challenge and granted a new trial. Thus, juror nondisclosure of material information is not a merely hypothetical problem. It is a real problem which occurs in a variety of circumstances even more egregious than those in *Greenwood*. Where such nondisclosure results in the substantial impairment of important rights, the appropriate remedy, a new trial, must be available.

clusion[4] those facts may be obtained by means other than a hearing at which a juror is forced to testify. Indeed, this Court should not set down a rule requiring a hearing in all circumstances because the spectre of jurors being hauled into a hearing may diminish a citizen's willingness to serve as a juror.

IV. CONCLUSION

The Tenth Circuit has recognized that counsel is entitled to material information when exercising peremptory challenges. The rule embodied in *Greenwood, Photostat* and *Carver* does not require a new trial each time a juror fails to answer a question during voir dire. Indeed the court states that if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge "has not been affected." *Photostat Corp. v. Ball,* 338 F.2d at 786. However, where the suppressed information is sufficiently indicative of bias either against a party or relating to some issue or factor in the case, it is information which a party was entitled to know and the juror's failure to disclose it denies the peremptory challenge right.[5] If

[4] Petitioner suggests that as a condition for granting a new trial a litigant prove that the nondisclosed information affected the jury deliberations. Petitioner's Brief on the Merits at 31. This rule would *never* allow litigants to gain new trials on the ground of juror nondisclosure. Fed.R. Evid. 606(b) provides in part: ". . . a juror may not testify . . . to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . ." The rule forecloses use of juror testimony to ascertain the effect of nondisclosed information on a verdict. *Martinez v. Food City, Inc.,* 658 F.2d 369 (5th Cir. 1981); *United States v. Greer,* 620 F.2d 1383 (10th Cir. 1980).

[5] Of course, if the Court determines that the current record provides an inadequate factual basis to determine the denial of the peremptory challenge right, it can remand for the development of a more complete factual record.

the peremptory challenge is to be more than a meaningless ritual, this Court must uphold the rule expressed in *Greenwood*.

Wherefore, Southern Union prays that the judgment of the Tenth Circuit be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing BRIEF OF AMICUS CURIAE SOUTHERN UNION COMPANY have been mailed this 19th day of September, 1983, to Donald Patterson, Esq., 520 First National Bank Tower, Topeka, Kansas 66603, Attorney for Petitioner, and Dan L. Wulz, 115 East Seventh Street, Topeka, Kansas 66603, Attorney for Respondents.

JERRY L. BEANE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: NEW MEXICO NATURAL GAS ANTITRUST LITIGATIONS

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' SECOND SUPPLEMENTAL MOTION FOR NEW TRIAL BASED ON JUROR DISQUALIFICATION

MDL No. 403

All Cases

Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification was orally argued on January 3, 1983. Prior to the hearing, the court reviewed all memoranda of counsel. Following the hearing, the court took the matter under advisement and has since reread the memoranda of counsel and read various authorities cited therein. Based on the foregoing, the court renders the following decision.

This matter is before the court on the Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification. That motion rests on two grounds: (1) defendants were denied their right to a fair and impartial jury, and (2) defendants were denied their right to exercise a peremptory challenge. Because the court finds that the defendants' second argument is meritorious, it will not reach the question of whether the issue of the impairment of the right to a fair and impartial jury is a separate and independent inquiry from the issue of impairment of the right to exercise a peremptory challenge and if so, whether an evidentiary hearing is necessary in the former instance to establish probable bias.

This consolidated litigation consists of five related actions. One of the actions, *Brewer, et al v. Southern Union Company, et al,* CIV 79-578-HB, was brought on behalf of all residential gas customers of Southern Union Company in New Mexico. The class certified in that action is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." Because Southern Union Company operates as a regulated gas utility in most areas of New Mexico through its division Gas Company of New Mexico, a majority of those persons normally available for jury service in New Mexico were class plaintiffs in the *Brewer* case.

Recognizing the difficulty of impaneling an impartial jury in this case, the presiding judge, Judge Bratton, requested counsel to submit proposed questions to be included in the questionnaire to be sent to prospective jurors. Defendant Southern Union Company's counsel submitted a proposed questionnaire which specifically asked whether potential jurors were class members or had relatives who were class members.[1] The court supplemented the standard juror questionnaire sent to all potential jurors with

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[1] The plaintiffs strongly opposed the inclusion of questions in the Jury Questionnaire that went beyond those specifically provided in 28 U.S.C. § 1865(b) and the automatic exclusion of any jury on the basis of such questions. In light of the court's decision to reject that position, the plaintiffs submitted a proposed questionnaire that narrowed the scope of inquiry the court had suggested. The court also rejected that proposal.

The plaintiffs' position, however, is immaterial to the resolution of this issue. What is important is the steps that were actually taken to ensure that every member of the jury panel was qualified to serve as a juror in this case.

an addendum asking prospective jurors the following question:

> Within the past eight (8) years have you, your spouse or any of your relatives been an employee of or a residential natural gas customer of the Gas Company of New Mexico or Southern Union?"[2]

Any person who answered "yes" to that question was automatically excluded from the potential jury venire.

As an additional effort to exclude from the jury those potential jurors who were members of or had relatives who were members of the *Brewer* class, Judge Bratton asked during the voir dire examination whether anyone on the jury venire wanted to change his answer on the questonnaire to the question whether he or any relative, as that term was defined in the questionnaire, had ever been a customer of Gas Company of New Mexico or Southern Union during the last eight years. One potential juror responded that she had inadvertently omitted to state on her questionnaire that she had been a customer of Southern Union about six and one-half years ago. The court immediately excused that juror for cause.

Mr. Dan Virden was selected and served as a juror in this case. He stated on the supplemental questionnaire that none of his relatives were class members, and he remained silent during the voir dire examination when the court asked if any prospective juror wanted to change his answer on the questionnaire. Despite his representations that none of his relatives were class members, it is undisputed that

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[2] The term "relatives" was expressly defined in the questionnaire as "children (natural or adopted), parents (including stepfathers and stepmothers), grandparents, and brothers and sisters (including half-brothers and half-sisters), for both you and your spouse."

Dan Virden has three children who have been residental gas customers of Southern Union Company for some period of time since July, 1976 and that none of those children opted out as a class member during either of two class notice opt-out opportunities. Thus, if juror Dan Virden had correctly answered the supplemental questionnaire, he would have automatically been excluded from the prospective jury panel; if juror Virden had changed his answer to the questionnaire during the court's voir dire examination, he would have been excused for cause.

It is well settled in the Tenth Circuit that a new trial must be granted where a party's statutory right to exercise a peremptory challenge has been prejudicially impaired. *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982); *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964); *Consolidated Gas & Equipment Company of America v. Carver*, 257 F.2d 111 (10th Cir. 1958). The standard used by the Tenth Circuit to determine whether that right has been prejudicially impaired by a juror's failure to fully and truthfully answer questions propounded to the panel is whether there has been "a showing of probable bias of the juror with consequential prejudice to the unsuccessful litigant." *Greenwood v. McDonough Power Equipment, Inc.* 687 F.2d 338, 342 (10th Cir. 1982). Although the plaintiffs contend that the showing of probable juror bias and consequential prejudice to the defendants can only be made if there is an evidentiary hearing, that is not the law in this circuit. Rather, the requisite showing of probable bias and consequential prejudice has been made "if the suppressed information was of sufficient cogency and significance to cause [the court] to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge." *Photostat Corporation v. Ball*, 338 F.2d 783, 787 (10th Cir. 1964).

In this case, the court is convinced that the information withheld by the juror Virden[3] was information that the defendants' counsel were entitled to know when they exercised their peremptory challenges. One of the main concerns of the court and the parties from the outset of this case was to ensure that the jury was impartial. To accomplish that result, great pains were taken to exclude from the potential jury venire persons whose relatives were members of the *Brewer* class and to excuse for cause any member of the jury venire who had such relatives. It is beyond question that information which would lead to automatic exclusion or to a successful challenge for cause was information that defendants' counsel were entitled to know when exercising their peremptory challenges.[4] Thus, the facts on the record are sufficient to find that the defendants' right of peremptory challenge was prejudicially impaired, entitling them to a new trial.

Although counsel may waive his right to challenge the qualifications of a juror by failing to exercise reasonable diligence in questioning potential jurors, *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966), the defendants' counsel in this case did all that was required of them under the circumstances to preserve their right to challenge the qualifications of juror Virden.[5] On two separate occasions, each

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[3] It is immaterial whether the failure to disclose the information was inadvertent or intentional. *Greenwood v. McDonough Power Equip., Inc.*, 687 F.2d 338, 342 (10th Cir. 1982).

[4] It does not matter whether the defendants' counsel would have actually peremptorily challenged juror Virden had he disclosed the information. *See Greenwood v. McDonough Power Equip., Inc.*, 687 F.2d 338, 342 (10th Cir. 1982).

[5] The plaintiffs' reliance on *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966) to establish that the defendants failed to make a diligent inquiry is misplaced. In *Brown*, the court found that

prospective juror was asked whether any of his relatives were or had been a customer of the Gas Company of New Mexico or Southern Union Company; each time the question was asked, it was clearly stated and unambiguous. In each instance, Juror Virden unequivocally represented that his relatives were not and had not been customers of the Gas Company of New Mexico or Southern Union Company. Thus, any further questioning on that subject was completely unnecessary.

IT IS THEREFORE ORDERED that the Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification be and hereby is granted.

Dated this 17th day of January, 1983.

/s/ David K. Winder

DAVID K. WINDER
United States District Judge

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the term "immediate family" was ambiguous and had not been defined and that counsel had failed to explain to the prospective jurors that the term "immediate family" included a relative such as brother.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED MAY 20, 1982
U.S. Court of Appeals Fourth Circuit

No. 81-1812

MAUDELL H. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1813

FLETCHER L. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1814

SOUTHEASTERN FREIGHT LINES,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

Appeals from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge.

Argued February 2, 1982 Decided May 20, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit

Judge, and PHILLIPS, Circuit Judge.

Sam Daniels (Daniels and Hicks; John M. Kenney, John M. Kenney, P.C.; Joseph R. Young, Young, Clement, Rivers & Tisdale; Wade H. Logan, III, Holmes, Thomson, Logan & Cantrell on brief) for Appellants; Cody W. Smith Jr. (Solomon, Kahn, Smith & Baumil on brief) for Appellees.

PER CURIAM:

This diversity action for personal injuries arose from a collision between a tractor-trailer unit and a tanker rig, the latter being equipped with tires manufactured by defendants, one of which blew out in the course of the collision. As a result of a stipulation between the parties entered into after a prior appeal, the determinative question as to liability was whether the tire blew out without being penetrated by an external object or whether the blowout resulted from the penetration of an external object.

On conflicting evidence, the jury found that the tire blew out without being penetrated by an external object and it awarded substantial damages to plaintiffs. Defendants appeal contending that the judgment entered on the verdict should be reversed and a new trial awarded because of reversible error in (1) the failure of the juror who was selected as foreman to disclose that as plaintiff she had settled a personal injury claim and had another pending while she served in the instant case, and the failure of two other jurors to disclose that they had prior experience with tire blowouts, despite interrogation on voir dire about

both subjects, and (2) the admission into evidence of a portion of a written statement of the deceased driver of one of the vehicles taken by an insurance adjustor.

We affirm.

VOIR DIRE

A. Failure to Disclose Personal Injury Claims.

The entire venue was questioned by the district court as follows:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages? If so, please stand and give your name.
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Caryl C. Polk, who was appointed foreman of the jury by the district court after all of the evidence was received, did not respond to either question. At a post-verdict hearing, it was shown that she had brought a suit for personal injuries as a result of an automobile accident in 1974, that that case was settled, that she had been involved in an accident in December 1980, and that after retaining counsel that case was also settled after the trial of the instant case. The 1974 accident did not involve the blowout of a tire, nor did Mrs. Polk sustain injuries comparable to those of the plaintiff in the instant case. The details of the 1980 accident were not developed.

Mrs. Polk testified that she was sitting in the back of the courtroom during voir dire and heard neither question about whether she had been sued or sued anyone. She did not communicate the fact of either accident to other jurors, and she also testified that she did not intentionally or deliberately withhold information from the district court.

The district court found that Mrs. Polk did not intentionally or deliberately withhold information and it concluded that defendants were not prejudiced by her service as a juror.

B. Failure to Disclose Blowout Experience.

The venire was also asked:

> Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire blew out? If so, please stand and explain the circumstances.

Neither Mrs. Pennington nor Mrs. Carrigg, both of whom served as jurors, respond to this question.

In the post-verdict proceedings, it was established that about ten years before, Mrs. Pennington had been operating a vehicle when a tire blew out. She testified that the incident was so insignificant that she did not recall it during voir dire and she did not recollect it until she was questioned during a lengthy telephone conversation by defendants' lawyers. She also testified that she did not remember the make of the tire involved nor the nature of the problem with the tire. She did not consider the tire defective and she received no injuries. She claimed that she had not knowingly withheld information from the district court.

Mrs. Carrigg, too, had had an experience comparable to a blowout. She had steered her vehicle into a curb to avoid a collision with another vehicle and the impact with the curb caused her tire to blow out. She said that her experience was unlike the evidence that she had heard in the instant case.

The district court found that neither juror had intentionally failed to respond to voir dire. With regard to Mrs. Carrigg, the court expressed doubt as to whether her ex-

perience constituted a blowout, and, with regard to Mrs. Pennington, found that she had not recalled her experience during voir dire. Based upon other testimony, the district court found that neither juror had discussed her experience in the jury room and that the experiences of both were dissimilar to what happened in the case at bar.

C. Discussion and Ruling.

With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See* United States v. Bynum, 634 F.2d 768, 771 (4 Cir. 1980); McCoy v. Golstein [sic], 652 F.2d 654 658 (6 Cir. 1981). But, here, where the nondisclosure was not deliberate, the only inquiry is whether the jurors' post-verdict responses disclosed actual bias or prejudice as a matter of law. *See* United States v. Vargas, 606 F.2d 341, 344 (1 Cir. 1979); United States v. Mulligan, 573 F.2d 775, 777 (2 Cir.), *cert. denied,* 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test. In the case of Mrs. Polk, neither of her accidents was shown to have any similarity to the case she was hearing and neither was shown to have involved a blowout. In as litigious a country as the United States and in as litigious an era as the present, we cannot say as a matter of law that one who has been a litigant is ineligible from that fact alone for jury service in a suit for personal injuries. With regard to Mrs. Carrigg and Mrs. Pennington, the possibility of bias or prejudice is even less. While Mrs. Pennington had had experience with a blowout, the incident was so remote and so insignificant that she did not recall it, or, when her recollection was refreshed, any of its significant details. Mrs. Carrigg's experience, while technically, perhaps, with a blowout, was so dissimilar to the case in which she sat that we cannot

conclude that her ability to be an objective juror was adversely affected.

ADMISSIBILITY OF WRITTEN STATEMENT

Mr. Mitchell Barnhill was the operator of the tanker rig which was involved in the collision. Within the period of five to fifteen minutes after the collision, he made several comments about how the accident occurred to other truck drivers who had stopped to give assistance. At trial, they were permitted to testify about what Barnhill had said, apparently under the excited utterance exception to the rule against hearsay. Rule 803(a), Fed. R. Evid. His statements were to the effect that he heard a loud explosion and thereafter felt an impact to his vehicle.

A week after the accident, Barnhill was interviewed by an insurance adjustor and gave a written, unsworn statement which he signed, page by page. By the time of the trial, Barnhill had died from causes unrelated to the accident, and at trial, a portion of his statement was read to the jury. The statement, in essence, was that the explosion occurred before the impact, a most material fact under the stipulation of the parties as to liability. The district court ruled this portion admissible under Fed. R. Evid. Rules 803(24) (the catchall "other exceptions" exception to the rule against hearsay) and 804(b)(5) (permitting admission of written statements given under certain guarantees of trustworthiness).

We think it debatable whether the statement was admissible under the rules, but it is unnecessary for us to resolve the issue. Even if inadmissible, the portion of the statement admitted was merely cumulative of the excited utterances which were clearly admissible. Any error was therefore harmless.

AFFIRMED.